

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 95-40
	:	
FRANCIS FILEWICZ	:	

MEMORANDUM AND ORDER

BECHTLE, J.

SEPTEMBER 10, 1997

Presently before the court is Defendant Francis Filewicz's ("Defendant") Motion Pursuant to 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, and the United States of America's ("the Government") response thereto. For the following reasons, the court will deny the motion.

I. BACKGROUND

Defendant pled guilty before this court to six controlled substance possession and distribution-related counts. On September 13, 1995, the court sentenced him, pursuant to the United States Sentencing Guidelines (the "Guidelines"), to a 108-month term of imprisonment. On March 28, 1997, Defendant filed this motion asking the court to modify his sentence and grant a reduction of two offense levels based upon a subsequent amendment to the Guidelines. On June 19, 1997, the Government filed its response. On July 3, 1997, Defendant filed a reply.

II. DISCUSSION

Defendant filed this motion eighteen months after he was sentenced, asking the court to depart downward from the Guidelines pursuant to Amendment 515, codified as Guidelines Section 2D1.1(b)(4), which permits a decrease of two offense levels for those individuals who satisfy the requirements set forth in Section 5C1.2.¹ Defendant argues that he meets all five prongs of Section 5C1.2, and he is therefore entitled to Amendment 515's reduction of two offense levels.

The Government contends that Defendant is not entitled to relief because Amendment 515 took effect after he was sentenced and is not retroactive. The Government also argues that even if Amendment 515 were retroactive, Defendant has not satisfied the requirement under the fifth prong of Section 5C1.2. (Gov't Mem. Opp. Depart. at 4.).

Section 5C1.2 provides:

In the case of an offense under 21 U.S.C. § 841, 844, 846, 960, or 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

(1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

1. Section 5C1.2 is nicknamed the "safety valve" provision because it allows the court to sentence less culpable and/or first-time offenders to a term within the guidelines below the statutory mandatory minimum, if they satisfy the listed criteria. United States v. Torres, 99 F.3d 360, 361 (10th Cir. 1996).

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager or supervisor of others in the offense, as determined under the sentencing guidelines, and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant had no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Amendment 515 provides:

(4) If the defendant meets the criteria set forth in subdivision (1)-(5) of 5C1.2 (Limitation on Statutory Minimum Sentences in Certain Cases) and the offense level determined above is Level 26 or greater, decrease by two levels.

Defendant was sentenced on September 13, 1995. The Guidelines Manual specifically and emphatically provides that the effective date of Amendment 515 is November 1, 1995. See Guidelines Manual, App. C at 416. Amendment 515 was not in effect when Defendant was sentenced. Only amendments listed in Guidelines Section 1B1.10(c) may be applied retroactively. See

18 U.S.C. § 3582(c)(2); see also United States v. McFarlane, 81 F.3d 1013, 1014 (11th Cir. 1996). Amendment 515 is not included in that Section. The court concludes that it cannot be applied to reduce Defendant's sentence.²

III. CONCLUSION

Because Amendment 515 was not in effect when Defendant was sentenced, and cannot be applied retroactively, the court must deny Defendant's motion.³

An appropriate Order follows.

2. Other courts that have addressed this issue have held that Amendment 515 is not retroactive. See, e.g., United States v. Cardona, 107 F.3d 4 (2d Cir. 1997); United States v. Hellams, 92 F.3d 1183 (4th Cir. 1996); United States v. McFarlane, 81 F.3d 1013, 1014 (11th Cir. 1996); United States v. Munoz, 967 F. Supp. 1062 (N.D. Ill. 1997).

3. Because the court will deny the motion on this ground, it will not address the Government's second argument, that Defendant has not met the requirements under the fifth prong of Section 5C1.2.

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ORDER

AND NOW, TO WIT, this day of September, 1997, upon
consideration of Defendant Francis Filewicz's Motion Pursuant to
18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, and the Government's
response thereto, IT IS ORDERED that said motion is DENIED.

LOUIS C. BECHTLE, J.